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No. 00-249

In The Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON MOBIL CORPORATION, MOBIL OIL CORPORATION, SHELL OIL PRODUCTS COMPANY, AND TEXACO REFINING AND MARKETING, INC.
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR MEMBERS OF CONGRESS DENNIS J. KUCINICH, JOHN E. BALDACCI, THOMAS S. BARRETT, WILLIAM O. LIPINSKI, CYNTHIA McKINNEY, FRANK PALLONE, JR., AND BERNARD SANDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GENE E. GODLEY
Counsel of Record
SCOTT H. SEGAL
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W., Suite 500
Washington, D.C. 20006-1872
(202) 828-5800

Counsel for Amici Curiae

13pp

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Respondent.

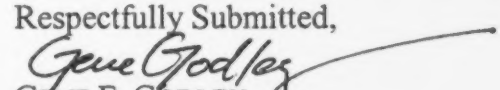
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Members of the House of Representatives of the United States of America Dennis J. Kucinich, John E. Baldacci, Thomas S. Barrett, William O. Lipinski, Cynthia McKinney, Frank Pallone, Jr., and Bernard Sanders hereby respectfully move for leave to file the attached brief *amici curiae* in the above-referenced case. The consent of the counsel of record for petitioners has been obtained. A letter of consent has been filed with the Clerk of the Court. The counsel of record for the respondent, Unocal, refused to give consent. Accordingly, *amici* hereby move for leave to file the attached brief *amici curiae*.

Amici are each Members of the U.S. House of Representatives and have an interest in ensuring that the patent dispute at issue in this case not jeopardize important aspects of national public policy favoring clean and affordable fuel supplies and favoring cooperative activities in anticipation of federal regulations.

Participating as *amici curiae*, these Members of Congress hope to aid the Court in its consideration of the petition for writ of certiorari by providing insight into the complexities of the important federal policies at issue in the above-referenced case.

Respectfully Submitted,



GENE E. GODLEY
Counsel of Record
SCOTT H. SEGAL
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W., Suite 500
Washington, D.C. 20006-1872
(202) 828-5800

Counsel for *Amici Curiae*

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INTEREST OF AMICUS CURIAE [1]

Amici are Members of the House of Representatives of the United States of America. Congressman Dennis J. Kucinich represents the Tenth District of Ohio. Congressman John E. Baldacci represents the Second District of Maine.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amici curiae* Members of Congress was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their staff has made a monetary contribution to the preparation of this brief.

Congressman Thomas M. Barrett represents the Fifth District of Wisconsin. Congressman William O. Lipinski represents the Third District of Illinois. Congresswoman Cynthia McKinney represents the Fourth District of Georgia. Congressman Frank Pallone, Jr. represents the Sixth District of New Jersey. Congressman Bernard Sanders represents the State of Vermont. *Amici* have an interest in ensuring that the patent dispute at issue in this case not jeopardize important aspects of national public policy favoring clean and affordable fuel supplies and favoring cooperative activities in anticipation of federal regulations.

ARGUMENT

The Court of Appeals for the Federal Circuit has upheld a patent for a fuel descriptive of an anticipated regulatory requirement developed by an administrative agency. The agency was working in close cooperation with members of the regulated community and public interest groups. By upholding this patent, the Federal Circuit has inflicted substantial collateral damage on two important federal policies. The first policy, reflected in the federal Clean Air Act, is to produce clean reformulated gasoline in an affordable manner. Congress has expressly indicated in energy and antitrust legislation that consumer interests are to be protected. The second policy, reflected in the Federal Advisory Committee Act and other statutes, is to encourage cooperative efforts in anticipation of rulemaking in order to facilitate appropriate research and implementation. By failing to consider adequately the context in which the patent was developed, the Federal Circuit has undermined these important public policy objectives to the detriment of the consumer and the environment.

I. The Federal Circuit Decision Undermines the Strong Federal Interest in Protecting the Environment and the American Consumer

A. There Is a Strong Federal Interest Both in Protecting the Environment and in Protecting Gasoline Consumers.

The Congress of the United States adopted the Clean Air Act, 42 U.S.C. § 7401 et seq., with the clear purpose in mind "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). In addition, Congress has been clear in both federal energy policy[2] and in antitrust policy[3] that consumer

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[2] Federal Energy Administration Act of 1974 § 2(a), 15 U.S.C. § 761(a)("The Congress hereby declares that the general welfare and the common defense and security require positive and effective action" to ensure "the maintenance of fair and reasonable consumer prices" for energy); Department of Energy Organization Act § 102(9), 42 U.S.C. § 7112(9)(purpose of Act "[t]o promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost.").

[3] *Solutions to Competitive Problems in the Oil Industry, Part 3: Hearings Before the House Comm. on the Judiciary,* 106th Cong. (2000)(statement of Richard G. Parker, Director, Bur. of Competition, FTC)("Consumer welfare is the goal of antitrust enforcement across all industries. Its importance is particularly clear in the energy industry, where even small price increases can strain the budgets of many consumers, particularly those with low and fixed incomes, and of small business, and, as a result, can have a direct and lasting impact on the entire economy. In fiscal years 1999 and 2000 to date, the Bureau of Competition spent almost one-third of its total enforcement budget on investigations in energy industries.") <http://www.house.gov/judiciary/park0628.htm>

welfare should be protected through maintaining adequate energy supply and reasonable prices.

B. The Federal Circuit Decision Undermines Consumer Protection Interests.

In the summer of 2000, American consumers were treated to gasoline prices substantially higher than predicted by industry or government.[4] The factors that contributed to this gasoline price increase are many, including higher crude prices, the use of ethanol in clean, reformulated gasoline ("RFG"), pipeline problems, and low inventories of crude oil, gasoline, and blendstocks.[5] However, another factor complicating the situation for gasoline consumers was the continuing controversy surrounding the patents for gasoline reformulation claimed by the Unocal Corporation. These patent claims imposed direct costs on refiners allegedly operating under the teachings of the patent, and indirect costs for refiners attempting to blend around the patents. Worse yet, given the acknowledged tightness in RFG supplies in certain regions, the Unocal controversy created a chilling effect forcing some refiners to reconsider their continued participation in the RFG program. Taken together, legal uncertainties present in this case helped to perpetuate conditions under which the spot

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[4] William Claiborne & Ceci Connolly, *Presidential Politics at the Pump*, Wash. Post, June 22, 2000, at A1 (referencing substantial increases in gasoline prices, particularly related to reformulated gasoline markets in the Midwest).

[5] Lawrence Kumins, Cong. Res. Service Report to Congress No. RL30592, *Midwest Gasoline Prices: A Review of Recent Market Developments* (June 28, 2000) (hereinafter "CRS Report"), at 1-2.

market for RFG was quick to yield high prices and slow to return them to more acceptable levels.[6]

While the litigants in this matter may legitimately disagree over the aggregate effect of the Unocal patent on the price of RFG, there can be no doubt that the atmosphere created by the controversial origin of the patent has undermined the stability of the RFG program. The Congressional Research Service wrote that, "refiners using the Unocal process without a license operate in an area of uncertainty, because the cost of licensing the Unocal process has not yet been determined. Some contend that this uncertainty created by the court decision has adversely impacted RFG production." CRS Report at 7.

Essentially, the Federal Circuit has placed the policy goals of environmental protection and consumer welfare squarely in conflict by failing to consider the circumstances under which the Unocal patent was developed, amended, and ultimately granted.

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[6] This widespread consensus is discussed at *Unocal Offers Truce in Gasoline Patent Row*, Reuters, August 18, 2000, available at www.reuters.com/news_company ("The patents are widely blamed for contributing to high gasoline pump prices in the U.S. this year, making it more difficult for refiners to meet new federally mandated clean burning fuel requirements used at roughly a third of the nation's pump."). See also Cathy Landry, *US EPA to Propose Credit Linked to Ethanol*, Platt's Oilgram News, June 29, 2000, at 1 ("Some industry sources have said fear of infringing on Unocal's RFG patent has played a role in the surging Midwest RFG prices."); Suzanne McElligott, *Unocal Collects on MTBE Patent*, Chemical Week, July 5, 2000/July 12, 2000, at 26 ("The [Unocal] patent has been cited as a reason for the higher prices of gasoline where reformulation is required."); Alexei Barrionuevo, *A Patent Fracas Pits Unocal Corp. Against Big U.S. Oil Producers*, Wall St. J., August 17, 2000, at A1 (Unocal patent royalties "would probably be translated into higher prices at the gas pump.").

II. The Federal Circuit Decision Undermines the Strong Federal Interest in Encouraging Open and Balanced Cooperation Between the Regulated Community, Public Interest Groups, and Governmental Agencies in Developing Environmental Standards

A. There Is a Strong Federal Interest in Encouraging Cooperative Efforts to Implement Environmental Programs.

The U.S. Congress has long recognized the value of cooperative negotiations between industrial, public interest, and governmental actors. See Federal Advisory Committee Act, 5 U.S.C. App. 2 § 2(a) (Congressional finding that such cooperative negotiations "are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government."); see also *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). The adoption of statutes like FACA was with the purpose in mind of preserving vital cooperative efforts without subverting the process to the special interest motivations of the participants. Id.; see H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3496 ("One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns."). The use of cooperative regulatory negotiation was a particularly critical element in the development and implementation of the federal RFG program. Such cooperation is essential to developing complex programs, and to ensure that such programs are implemented with a minimum of subsequent interference from

either the courts or Congress.[7]

B. The Federal Circuit Decision Undermines Cooperative Efforts.

Far more is at stake in the current case than the cost-effectiveness of the federal RFG program. Unocal participated in cooperative exercises with state and federal officials and fellow members of the industrial community. Thereafter, Unocal manipulated its patents through amendment to capture the fruits of this joint labor.[8] It did so without the "full, clear, concise, and exact" statement required under applicable patent law. 35 U.S.C. § 112. If the patent law allows Unocal to benefit from participation in cooperative negotiations as cover for its own pecuniary gain, the whole fabric of regulatory negotiation and compromise may well fray. Barrionuevo, *supra*, at A1 (citing economists that "see the Unocal patent case as cause for concern beyond the petroleum business. It could discourage companies in high-technology and other industries from collaborating on environmental standards, if rivals worry that one of their number will patent the result, according to this view."). The loss of cooperation undermines the regulatory process, and can diminish environmental protection if research

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[7] *See* Migdon Segal, Cong. Res. Service Report 93-614SPR, *Ethanol and Clean Air: The "Reg-Neg" Controversy and Subsequent Events* (June 22, 1993) at 3, available at www.cnie.org/n/e/air-7.html. ("This negotiation was intended to keep the potentially controversial regulations out of the courts, and to avoid future congressional involvement, by obtaining agreement among all interested parties before the regulations were written. EPA would then write the regulations, but this would presumably be a straightforward and noncontroversial task, embodying the principles already agreed to in the negotiated agreement.").

[8] Barrionuevo, *supra*, at A8 (describing Unocal's effort to manipulate regulatory negotiations to benefit from patent applications).

efforts are thereby chilled. See H.R. Rep. No. 106-674, at 47 (2000)(environmental research necessary "to provide the scientific knowledge and technologies necessary for preventing, regulating, and abating pollution, and to anticipate emerging environmental issues.").

CONCLUSION

The Patent Clause of the U.S. Constitution "does not allow the granting of these valuable franchises to private individuals, with consequent public detriment, unless there is a concomitant public benefit." *Beckman Instruments, Inc. v. Chemtronics, Inc.*, 439 F.2d 1369, 1371 (5th Cir. 1970). *Amici* respectfully submit that the context of regulatory development in which the present patent was filed and amended presents important public detriments (without corresponding benefits), reflected in both consumer and environmental policy.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

GENE E. GODLEY
Counsel of Record
SCOTT H. SEGAL
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W., Suite 500
Washington, D.C. 20006-1872
(202) 828-5800

Counsel for Amici Curiae

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